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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA,)	Case No. 6:11-cr-02041-LLR-1
)	
Plaintiff,)	
)	MOTION TO DISMISS
vs.)	
)	
)	
Gene Jirak,)	
)	
Defendant.)	

TO THE HONORABLE JUDGE:

Defendant, Gene Jirak, In Proper Persona and not pro se, by and through himself, hereby brings this motion to dismiss on behalf of the defendant.

I.

INTRODUCTION

The Defendant, Gene Jirak (herein after "Defendant") was indicted by the US Grand Jury on 2 counts of False Claim for Tax Refund, 1 count of Uttering a Forged Treasury Check, 1 count of Mail Fraud and 1 count of Aggravated Identity Theft. Defendant has relied upon certain advice from persons holding themselves out to be tax professionals. Defendant herein moves this

1 Court to dismiss the indictment based upon reliance and therefore there can be no knowing
2 willfulness to cause criminal indictment.

3 II.

4 FACTS

5 On or about November 25, 2008 the Defendant contacted a company known as Liberty
6 Tree tax service (Tim and Connie Strain) from Baton Rouge Louisiana (herein after "Liberty").
7 who told the Defendant that they (Liberty) had programs that would get him out his financial
8 situations. That Liberty had an 1099 OID program that would assist in defendant's financial
9 problems and that Liberty would prepare all of the Defendants tax returns and documents in
10 association with their programs. In the discussions with Liberty, they also told Defendant that
11 they could get him all back income taxes Defendant had paid to the US.

12 Defendant went to phone seminars put on and prepared by Liberty. Defendant received
13 many emails (attached herein as Exhibit "A") from Liberty. Those emails clearly show that
14 Liberty was at the helm on creating and instructing the defendant in all filings done for the
15 defendant.

16 Defendant relied upon Liberty as knowing the best way of handling the Defendant tax
17 affairs to Defendant's detriment. The Defendant herein is a victim of predatory tax schemes.

18 III.

19 MEMORADUM IN SUPPORT OF MOTION TO DISMISS

20 III a. Detrimental Reliance

21 In the case at bar, the Defendant relied upon the tax advice of a company known as
22 Liberty who's persons in control of that company made themselves out to be tax advisors and
23 professionals, who prepared the Defendants tax returns (attached herein as exhibit "B"). The
24 Defendant detrimentally relied upon Liberty. The Defendant moves this Court to dismiss all
25 counts of the indictment under reliance of the Defendant.

26 This case is not one in which a taxpayer has relied on the erroneous advice of counsel
27 concerning a question of law. Courts have frequently held that "reasonable cause" is established
28 when a taxpayer shows that he reasonably relied on the advice of persons who hold themselves

1 out to be professionals, even when such advice turned out to have been mistaken. See, e.g.,
2 United States v. Kroll, 547 F.2d 393, 395396 (CA7 1977); Commissioner v. American Assn. of
3 Engineers Employment, Inc., 204 F.2d 19, 21 (CA7 1953); Burton Swartz Land Corp. v.
4 Commissioner, 198 F.2d 558, 560 (CA5 1952); Haywood Lumber & Mining Co. v. Commis-
5 sioner, 178 F.2d at 771; Orient Investment & Finance Co. v. Commissioner, 83 U.S.App.D.C. at
6 75, 166 F.2d at 603; Hatfried, Inc. v. Commissioner, 162 F.2d at 633-635; Girard Investment Co.
7 v. Commissioner, 122 F.2d at 848; Dayton Bronze Bearing Co. v. Gilligan, 281 F. 709, 712
8 (CA6 1922). This Court also has implied that, in such a situation, reliance on the opinion of a tax
9 adviser may constitute reasonable cause for failure to file a return. See Commissioner v. Lane-
10 Wells Co., 321 U.S. 219 (1944) (remanding for determination whether failure to file return was
11 due to reasonable cause, when taxpayer was advised that filing was not required)

12 When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a
13 liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not
14 competent to discern error in the substantive advice of an accountant or attorney. To require the
15 taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the
16 provisions of the Code himself would nullify the very purpose of seeking the advice of a
17 presumed expert in the first place. See Haywood Lumber, supra, at 771. "Ordinary business care
18 and prudence" do not demand such actions", United States v. Boyle, 469 U.S. 241, 250-01
19 (1985).

20 Therefore, this Court should dismiss all counts in the indictment.

21 22 III b. The Willfulness Test

23
24 In the case at bar, the Defendant relied upon the tax advice of Liberty. The Defendant
25 detrimentally relied upon Liberty. The Defendant moves this Court to dismiss all counts of the
26 indictment under reliance of the Defendant and the fact that there can be no willfulness to
27 commit the crimes alleged in the indictment.

28 In the following cases the requirement that the offense denounced by the indictment be

1 "willful" or "knowingly" was held to require something in addition to knowledge that the act
2 omitted by the defendant was required of him by statute. That is, the following opinions indicate
3 a requirement that the failure to do the required act or act not to be done, be not only with
4 knowledge of the requirement or act, but with intent to evade the tax laws or with a similar "evil
5 motive."

6 In the case at bar, the defendant relied upon Liberty and the advice of them. Liberty,
7 preparing Defendant's tax returns and telling defendant to filing said tax returns with the IRS.
8 The Defendant detrimentally relying upon those tax returns, received no communications from
9 the IRS telling the Defendant the tax returns were frivolous or otherwise.

10 The test of willfulness or knowingly, as found in the statute, involves more than a finding
11 that the defendant's actions or omissions were intentional, it was held in *United States v*
12 *Murdock* (1933) 290 US 389, 78 L Ed 381, 54 S Ct 223. In approving of a requested instruction
13 to the effect that if the jury believed that the reasons stated by the defendant for his refusal to
14 answer questions were given in good faith and based upon actual belief, it should consider such
15 good faith and actual belief in determining whether or not the defendant's refusal to answer was
16 willful, the court noted that the term "willfully," as used in criminal statutes, generally means an
17 act done with a bad purpose, and that in the present instance, the other omissions which the
18 statute denounced, including the failure to file or pay taxes as required, aided in interpreting the
19 meaning as it respected the offense charged—that of willfully refusing to answer questions and
20 give information.

21 Congress did not intend, the court held, that a person, by reason of a good-faith
22 misunderstanding as to his liability for tax, as to his duty to make a return, or as to the adequacy
23 of the records he maintained, should become a criminal by his mere failure to measure up to the
24 prescribed standard of conduct, and the requirement that the omissions in these instances must be
25 willful in order to be criminal is persuasive, the court continued, that the same element is
26 essential to the offense of failing to supply information. The court therefore held that the
27 defendant was entitled to the charge he requested with respect to good faith and actual belief. In
28 noting that the term "willful," often used to denote an act done intentionally, as distinguished

1 from accidentally, means, when used in a criminal statute, an act done with a bad purpose, the
2 court, in a portion of its opinion often quoted by other courts, listed a number of the definitions
3 given to this term in the context of a criminal statute: without justifiable excuse; stubbornly,
4 obstinately, perversely; or a thing done without ground for believing it is lawful.

5 In the case at bar, the Defendant has a justifiable excuse, which is the Defendant relied
6 upon professionals who advised the Defendant to his detriment, without government telling the
7 defendant otherwise.

8 Findings of fact based upon what the court regarded as the test of willfulness as defined
9 in *United States v. Murdock* (US) *supra*, especially that part defining the term "willfulness" to
10 include a thing done without ground for believing it is lawful, or, conduct marked by careless
11 disregard of whether or not one has the right so to act, were held error in *United States v. Palermo*
12 (1958, CA3 Pa) 259 F2d 872. In criticizing the lower court for its failure to include in its test the
13 factor of evil motive or bad purpose, the court stated that factors such as those found by the
14 lower court, including obstinacy, action without justifiable excuse, and careless disregard, were
15 not factors which, either singly or cumulatively, were self-sufficient to establish "willfulness"
16 under the statute, and the court also included among these factors that of "gross negligence."

17 Adhering to its opinion in an earlier case involving the felony section dealing with willful
18 evasion of taxes, the court held that "willfulness" required a specific wrongful intent, and an
19 "evil motive," the burden of establishing which is on the prosecution.

20 The court then held that the proper standard of willfulness, as applied to the situation
21 presented, required the existence of a specific wrongful intent —an evil motive —at the time the
22 crime charged was committed. A series of defaults, knowingly and intentionally made, may
23 suggest the existence of the required "evil motive," but mere laxity or careless disregard of the
24 duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of
25 willfulness, the court held.

26 Instructions to the jury in which the trial court defined the term "willfully" as used in the
27 statute as meaning "a careless disregard whether or not one has a right to do so," or "a bad
28 purpose or without grounds for believing that one's act is lawful....," and similarly, were held

1 error in *United States v Vitiello* (1966, CA3 NJ) 363 F2d 240, 22 ALR3d 1161, a prosecution for
2 failure to file tax returns, as being improper dilutions of the scienter required by the statute.
3 Recognizing that the instructions given by the lower court were found in the opinion in *United*
4 *States v Murdock* (1933) 290 US 389, 78 L Ed 381, 54 S Ct 223, *supra*, the court stated that the
5 enumeration of different meanings given to the term "willful" in the context of various criminal
6 statutes, found in that opinion, and on which the lower court had based its instructions, should
7 not be read as a statement that these meanings were those intended by that court to define the
8 term as used in the statute under consideration, the court noting that the conclusion in that
9 opinion was that "willful," as an element of the offense under consideration, connoted "bad faith
10 or evil intent." The court disposed of a contention that a distinction should be made between the
11 requirement of willfulness as found in the statute under consideration and as found in that
12 making an attempt to evade taxes a felony, by stating that the opinion cited in support of that
13 contention, *Spies v United States* (1943) 317 US 492, 87 L Ed 418, 63 S Ct 364, although
14 containing words to that effect, resulted in a holding that the failure made criminal by this statute
15 must include "some element of evil motive." Conviction in the court below was therefore
16 reversed in order that the jury might be instructed that the willfulness required by the statute
17 included an intentional and reprehensible act, attended by knowledge of one's tax obligations and
18 intent to avoid them, excluding any element of carelessness or gross negligence.

19 To the same effect, see *United States v Pepe* (1962, DC Del) 209 F Supp 592, *affd* (CA3)
20 339 F2d 264. Also citing *United States v Palermo*, the court in *United States v Roy* (1963, DC
21 Del) 213 F Supp 479, held that in order for a criminal act to be willful, it must not only be
22 committed deliberately and knowingly, but with a bad motive or evil intent, and that the
23 prosecution had to prove that the defendant deliberately committed one or more of the specified
24 violations (failing to register for and pay wagering tax) with the intention of "getting away with
25 it."

26 Similarly, in *United States v McGonigal* (1963, DC Del) 214 F Supp 621, a prosecution
27 for failure to purchase a gambling tax stamp, it was stated that in order for a criminal act to be
28 willful, it must be committed not only deliberately and knowingly, but with a bad motive or evil

1 intent, citing *United States v Palermo* (1958, CA3 Pa) 259 F2d 872, *supra*. Simply stated, the
2 government must prove, in order to convict, that the defendant deliberately committed the
3 specified violation with the intention of "getting away with it," the court held.

4 The "willfulness" test enunciated in *United States v Palermo supra*, was approved in
5 *United States v Wilson* (1963, DC Del) 214 F Supp 629; *United States v Goodman* (1961, DC
6 Ill) 190 F Supp 847.

7 However, other earlier opinions by the Court of Appeals in the Third Circuit, while
8 taking the view that there must be an evil motive or purpose present in order to satisfy the
9 statute, apparently support a somewhat less strict view of what bad purpose, motive, or intent to
10 evade the law is required to show such evil motive or purpose.

11 Thus where, as part of its charge to the jury, the lower court had stated that the only bad
12 purpose or bad motive necessary for the government to prove in a prosecution for willful failure
13 to make income tax returns was the deliberate intention not to file returns which the defendant
14 knew ought to be filed, so that the government would not know the extent of tax liability, the
15 charge was approved in *United States v Litman* (1957, CA3 Pa) 246 F2d 206, cert den 355 US
16 869, 2 L Ed ed 75, 78 S Ct 118, notwithstanding that in a previous portion of the instruction the
17 court had said that the word "willful," as used in the statute, meant an act done with a bad
18 purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely,
19 or with a bad motive. The defendant argued that the use of the word "or" in such portion of the
20 charge tended to indicate that absence of legal justification, without regard for bad purpose,
21 might also amount to willfulness under the statute, but the court, treating the instructions as a
22 whole, held that the use of the word "or," if at all misleading, was not sufficiently misleading to
23 require correction, and also stated that the evidence gave the jury an adequate basis for a finding
24 that the defendant's failure to file income tax returns when due was "willful" in that the omission
25 was advertent and motivated by the bad purpose of "preventing the government from receiving
26 returns at the time required by law."

27 The definition of "willful" as meaning "voluntary, purposeful, deliberate, intentional as
28 distinguished from accidental, inadvertent or negligent," given to the jury in a prosecution for

1 willfully failing to file income tax returns, was approved in *United States v Cirillo* (1957, CA3
2 Pa) 251 F2d 638, cert den 356 US 949, 2 L Ed 2d 843, 78 S Ct 914. The court also instructed that
3 the only bad purpose or motive which it is necessary to prove is the deliberate intention not to
4 file a return which the defendant knew ought to be filed, so that the government would not know
5 the extent of the tax liability, and defendant objected that the court had not made clear the
6 necessity of showing "evil intent and bad purpose." However, on appeal, it was held that where
7 the offense charged is the misdemeanor of willfully failing to file a tax return, the phrase "bad
8 purpose" used as a characterization of "willfulness" serves merely to distinguish situations
9 involving good faith misconceptions of what is required from those where the failure to file has
10 been attended by knowledge of the legal obligations involved, and thus a specific evil motive
11 was held not to be a requirement of the definition of willfulness.

12 Approving this standard of willfulness is *United States v Long* (1958, CA3 Pa) 257 F2d
13 340.

14 Approving this standard for willfulness are *United States v Benus* (1961, DC Pa) 196 F
15 Supp 601, affd (CA3) 305 F2d 821; *United States v Di Silvestro* (1957, DC Pa) 147 F Supp 300.
16 The Court of Appeals for the Fifth Circuit also appears to require, as a part of the test for
17 willfulness under the statute, that there be not only knowledge of the existence of the obligation,
18 but also a wrongful intent to evade it.

19 Thus, in *Hargrove v United States* (1933, CA5 Tex) 67 F2d 820, 90 ALR 1276, where
20 defendant was convicted of willfully failing to file income tax returns, it was held that the trial
21 court had erred in refusing to give a requested instruction to the effect that the term "willful," as
22 used in the statute making the willful failure to file an income tax return a misdemeanor, implied
23 a knowledge on the part of the defendant and a purpose to do wrong. The lower court's position
24 that if defendant had failed to make his return and to pay his tax when due, the failure must be
25 deemed in law to have been willful, was rejected by the court on appeal, as failing to distinguish
26 between a statute simply denouncing the doing of a criminal act, and one denouncing as criminal
27 only the willful doing of an act, as in the statute under consideration. In a statute making criminal
28 the willful doing of an act, the court held, a specific wrongful intent, that is, actual knowledge of

1 the existence of the obligation and a wrongful intent to evade it, is of the essence.

2 A contention by the defendant in a prosecution for failure to file income tax returns that
3 an instruction which included a charge to the jury that "[you] are further instructed that the word
4 'willful' as used in this statute means with a bad purpose, or without ground for believing that
5 one's act is lawful, or with a careless disregard whether one has the right to so act," permitted the
6 jury to convict him for mere carelessness or inadvertence, contrary to the statutory requirement
7 that the failure to file be willful, was upheld on appeal, and the conviction reversed, in *Haner v*
8 *United States* (1963, CA5 Tex) 315 F 2d 792. The government's contention that the word
9 "willful" meant something less when used in a misdemeanor statute, as in the instant case, than
10 when used in a felony statute, was rejected by the court, which stated that "willful" generally
11 means intentional, knowing, or purposeful activity, as opposed to carelessness, thoughtless-ness,
12 heedlessness, or inadvertence, and the court specifically stated that it was unable to agree with
13 the charge approved in *Abdul v United States* (1958, CA9 Hawaii) 254 F2d 292, *infra* § 5, in
14 which a charge similar to the one given by the lower court in the instant case was approved.

15 However, another decision of the Court of Appeals in the Fifth Circuit appears not to re-
16 quire as definite a showing of intent or evil motive to satisfy the statutory requirement of
17 willfulness, at least where the prosecution is for willful failure to register or file a return.

18 The issue in *Edwards v United States* (1963, CA5 Fla) 321 F2d 324, was whether, in or-
19 der to sustain a conviction for willful failure to pay the special tax imposed on persons engaged
20 in the business of accepting wagers, proof was required that the defendants were aware of the
21 tax, and "willfully" refused to pay it, and the court held such proof indispensable, reversing the
22 convictions. Rejecting the prosecution's argument that ignorance of the law is no excuse, and that
23 evidence that defendants engaged in gambling as a business, together with their concession that
24 they had not paid the required tax, was sufficient to support the conviction, the court held that
25 where, as here, the statutory definition of the crime includes the element of willfulness, actual
26 knowledge of the existence of the obligation is required, and that mere ignorance or careless
27 disregard was insufficient. In so ruling, the court noted that although the cases it had cited in
28 support of this ruling were concerned with taxes other than the gambling tax, there was no reason

1 why the same rule should not apply in the instant case. In holding that the government had failed
2 to prove an essential element of the crime charged, that is, knowledge of the tax [or in the instant
3 case, knowledge of 1099 OID filings], the court noted that in cases involving nonpayment of
4 income tax, the almost universal knowledge of the existence of that tax might justify placing the
5 initial burden of proof of ignorance on the defendant. On rehearing in the above case, however,
6 in 334 F2d 360, cert den 379 US 1000, 13 L. Ed. 2d 702, 85 S Ct 721, where the convictions
7 were affirmed, the court held that if it was shown that defendants had failed to register for and
8 pay the wagering tax, and there was evidence from which the jury could have inferred beyond a
9 reasonable doubt that defendants had knowledge of the duties imposed upon them by the
10 wagering tax statutes, the test of willfulness would be met, the court quoting from that portion of
11 the opinion in Spies v United States (1943) 317 US 492, 87 L Ed 418, 63 S Ct 364, supra § 2[a],
12 in which it was stated that where applied to failure to make a return, the test of willfulness might
13 be satisfied by mere voluntary and purposeful, as distinguished from accidental, omission to
14 make a timely return, even though, in view of the traditional aversion to imprisonment for debt,
15 more might be required than mere knowing and intentional default in payment of a tax, where
16 there had been no willful failure to disclose the liability.

17 Therefore, this Court should dismiss.

18 IV.

19 CONCLUSION

20 Wherefore, having set forth various cases and authorities above and the facts therein, this
21 Court should dismiss the indictment on all counts, because the Defendant relied upon persons
22 who held themselves out to be professionals, therefore, there cannot not be any willful evil,
23 motive on the part of this Defendant.

24 Therefore, this Court should dismiss this case in its entirety.

25 Signed this 31st day of May, 2012,

26 Gene Jirak
27 Gene Jirak
28

PROOF OF SERVICE

Under penalties as provided by law pursuant to the Code of Civil and Criminal Procedure, the undersigned certifies that he/she served copies of this notice and accompanying pleadings on each of the person(s) listed at their respective addresses by mailing the same at or before 5:00 pm on 31st day of May, 2012 and/or personal service.

To:

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Gene Jirak
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